

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>FERNANDO J. ALTERI</b>	:	DETERMINATION
	:	DTA NO. 815078
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1988	:	
through May 31, 1993.	:	

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Petitioner, Fernando J. Alteri, 9 College Street, Clinton, New York 13323-1626, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1988 through May 31, 1993.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 14, 1997 at 1:30 P.M., with all briefs to be submitted by May 23, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Norman P. Deep, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation has met its burden of proof to show that its imposition of the fraud penalty pursuant to Tax Law § 1145(a)(2) against petitioner was proper.

***FINDINGS OF FACT***

1. The Division of Taxation ("Division") issued a Notice of Determination dated June 5, 1995 against petitioner, Fernando J. Alteri, asserting tax due plus a fraud penalty and interest on audited taxable sales as follows:

<u>Period Ended</u>	<u>Taxable Sales</u>	<u>Tax Due</u>	<u>Fraud Penalty</u>	<u>Interest</u>
11/30/88	\$ 37,723.36	\$ 2,640.64	\$ 2,843.66	\$ 3,046.67
02/28/89	31,942.06	2,235.94	2,337.65	2,439.36

05/31/89	34,534.58	2,417.42	2,452.10	2,486.78
08/31/89	34,574.77	2,420.23	2,381.82	2,343.41
11/30/89	34,714.95	2,430.05	2,321.01	2,211.96
02/28/90	36,033.64	2,522.36	2,338.94	2,155.53
05/31/90	38,936.45	2,725.55	2,452.08	2,178.59
08/31/90	38,979.44	2,728.56	2,399.42	2,070.30
11/30/90	40,092.52	2,806.48	2,397.88	1,989.28
02/28/91	43,077.57	3,015.43	2,501.31	1,987.18
05/31/91	42,876.64	3,001.36	2,415.47	1,829.58
08/31/91	35,147.66	2,460.34	1,921.08	1,381.82
11/30/91	33,053.27	2,313.73	1,753.37	1,192.99
02/29/92	37,368.22	2,615.78	1,923.84	1,231.90
05/31/92	38,597.20	2,701.80	1,927.91	1,154.02
08/31/92	35,970.09	2,517.91	1,743.18	968.44
11/30/92	43,401.85	3,472.15	2,332.97	1,193.78
02/28/93	43,567.59	3,485.41	2,273.61	1,061.81
05/31/93	<u>43,646.30</u>	<u>3,491.70</u>	<u>2,209.85</u>	<u>928.02</u>
Totals	\$724,238.16	\$52,002.84	\$42,927.15	\$33,851.42

This notice explained that "[t]he taxes shown have been determined to be due in accordance with section 1138 of the New York State Sales and Use Tax Law and are based on an audit of your records," and that "fraud penalties of 50 percent of the amount of the tax due plus statutory interest have been added pursuant to section 1145(a)(2) of the New York State Sales and Use Tax Law."

2. The Notice of Determination shows that the Division credited petitioner with the payment of \$52,002.84. However, this payment was allocated by the Division to tax, penalty, and interest for the earlier periods rather than just to tax due. At the hearing, the Division agreed that it would reallocate this payment entirely to tax due as petitioner had requested.

3. The Notice of Determination was a by-product of a criminal prosecution of petitioner resulting from his failure to file sales tax returns and to pay over to the State sales tax collected on the restaurant sales made by Alteri's Restaurant, located in the college town of Clinton, New York, and operated by petitioner as a sole proprietor.

4. Mr. Alteri testified that his restaurant has a bar about 25 feet long, a dining room that seats 80, a back room for meetings which holds 40 and a kitchen. Alteri's Restaurant, which opened on February 14, 1953, serves lunch and dinner specializing in Italian-American food including pizza. The kitchen is run by petitioner's wife, Beverly Alteri, who apparently serves as the restaurant's chef, with assistance from petitioner's "sisters or my daughter [who come in

and help] me out once in awhile" (tr., p. 71). The only paid employees are apparently two waitresses and a bartender who has been employed by petitioner for 27 years. Petitioner had testified, earlier in his direct testimony, that his son worked in the restaurant but when he specifically noted the restaurant's paid employees, he did not mention his son. Later in his testimony on redirect examination, petitioner added that his mother and mother-in-law also assisted in the kitchen:

"My mother was making homemade macaroni when she was 90 years old for the restaurant" (tr., p. 79).

5. The Division of Taxation conducted a search of its sales tax files for the years at issue and no sales tax returns or a certificate of registration were located. The Division's auditor testified that:

"The investigator who handled the case when he interviewed Mr. Alteri was informed that the last time that he could prove that he paid any sales tax was I believe in 1973" (tr., p. 36).

According to the auditor, the State did not seek to collect unpaid sales tax for earlier periods because "We can only go back five years for a criminal case for a felony" (tr., pp. 36-37).

6. The failure of Alteri's Restaurant to remit sales tax to the State came to light as a result of a special project of the Revenue Opportunity Division within the Department of Taxation and Finance. In early 1993, the Revenue Opportunity Division was conducting a project involving the matching-up of State liquor licenses with sales tax registrations. On April 8, 1993, the Revenue Crimes Unit of the Division's Office of Tax Enforcement located in Syracuse received a referral from the Revenue Opportunity Division concerning possible sales tax evasion by Alteri's Restaurant. A memorandum dated October 27, 1993 prepared by Clinton Woodford, tax enforcement investigator, states that a representative of the Revenue Opportunity Division spoke to petitioner who was unable to secure a valid sales tax number for the business or to provide copies of filed sales tax returns. Further, the only tax registration number Mr. Alteri could provide the Revenue Opportunity Division representative was the restaurant's Federal employer identification number.

7. By the introduction of (i) the memorandum of Investigator Woodford dated October 27, 1993, (ii) an affidavit of Investigator Woodford dated February 12, 1997, which authenticated three supporting depositions which he made in connection with the criminal proceeding against petitioner, and (iii) the testimony of the auditor who conducted the audit of Alteri's Restaurant, the Division established a detailed description of the events leading up to the criminal prosecution of petitioner and this administrative proceeding.

8. As noted in Finding of Fact "6", on April 8, 1993, the Revenue Crimes Unit of the Office of Tax Enforcement received a referral from the Revenue Opportunity Division concerning possible sales tax evasion by Alteri's Restaurant. The following day, on April 9, 1993, Investigator Woodford of the Revenue Crimes Unit visited the premises of Alteri's Restaurant where he encountered petitioner and advised him that he was conducting a criminal investigation into possible sales tax violations by the business. At this initial contact, petitioner advised the investigator that he charged sales tax to all customers and had been filing sales tax returns and remitting sales tax to the State on a regular basis. Mr. Alteri informed the investigator that his accountant, Joseph Kaiser, prepares his sales tax returns. On the same day, i.e., April 9, 1993, the investigator interviewed petitioner's accountant. Mr. Kaiser advised the investigator that he prepared all the required sales tax returns over the past years and gave them to petitioner to file. However, he did not know if Mr. Alteri filed the sales tax returns that he prepared.

9. About two weeks later, on April 22, 1993, petitioner brought his business records to Investigator Woodford's Syracuse office in response to a subpoena served by the investigator on April 9, 1993. On this later date, petitioner admitted to the investigator that he had not filed any State sales tax returns or remitted sales tax monies since the early 1980s, although he could not remember, according to the investigator's deposition, "exactly when he stopped remitting." Petitioner also admitted that he "had no excuse for not doing so," that he "has always charged and collected sales tax from his customers at the restaurant/bar," and that his accountant "prepared sales tax returns over the years and gave them to him, but [he] set the returns aside

and never remitted them." Petitioner turned over to the investigator his sales journals in which he kept track of the daily sales of Alteri's Restaurant.

10. Shortly thereafter, during the summer of 1993, the Division's auditor, Kim Raga, conducted an audit of Alteri's Restaurant and determined that during the audit period consisting of four years and nine months, Alteri's Restaurant had taxable sales of \$724,238.00 as detailed in Finding of Fact "1". Therefore, on an annual basis, the taxable sales of Alteri's Restaurant during the period at issue averaged approximately \$150,000.00. Petitioner has not contested the amount of taxable sales determined by the auditor.

11. After Ms. Raga's audit, she and Investigator Woodford prepared a memorandum dated October 27, 1993 for the Office of Tax Enforcement's principal attorney, James Zaccaria, recommending that petitioner:

"be charged with a violation of Article 37, Sec. 1817(d), Failure to Possess a Certificate of Authority, a misdemeanor, one count; Art. 37, Sec. 1817(a), Willful Failure to File a Return, a misdemeanor, eleven counts; and Section 155.40 of the Penal Law, Grand Larceny in the Second Degree, a Class C felony, one count."

12. Petitioner was charged in a criminal indictment as recommended by the investigator and auditor except that it appears he was not charged with failing to possess a certificate of authority. On January 31, 1995, petitioner pleaded guilty to petit larceny (Penal Law § 155.25) and one count of willful failure to file a return (Tax Law § 1817[a]). His sentence consisted of a conditional discharge and a fine of \$2,500.00. The conditional discharge was dependent upon petitioner's making restitution of tax of \$52,002.84 by March 28, 1995. The "Information Required on Completion of a Criminal Tax Case" shows that the Division reserved its right to pursue penalty and interest. The audit report indicates that petitioner "made his tax payment of \$52,002.84 at the time of his guilty pleas."

13. Petitioner did not introduce into the administrative record any independent evidence to contradict the facts as established by the Division through its introduction of the affidavit of the investigator and the testimony of the auditor. In fact, the only independent evidence introduced by petitioner consists of (1) letters written on his behalf by various prominent individuals in the Town of Kirkland (which includes the Village of Clinton) attesting to Mr.

Alteri's good character, readiness to assist people in need, and long-term support of projects for the betterment of the community including the establishment of various athletic programs and (2) a handwritten letter dated March 6, 1996 on the letterhead of petitioner's physician, Dr. Gino A. Trevisani, noting that Dr. Trevisani "treated [Mr. Alteri] for carcinoma of the larynx from February 1984 to June 1984." In Dr. Trevisani's opinion, petitioner was "under a great deal of mental stress and anguish" which "could have impaired his judgement in both his personal and business responsibilities."

14. In his direct testimony, petitioner indicated that in late 1987, he was diagnosed with throat cancer and became indifferent to "what happened" to his restaurant business (tr., p.45). On cross-examination, when confronted with the note of Dr. Trevisani indicating that he treated petitioner for cancer in 1984, petitioner testified, "That date is wrong" (tr., p. 53). Petitioner did not submit an affidavit of Dr. Trevisani or any other independent evidence to support his position that, in fact, the doctor's note introduced by petitioner into the record was in error.

15. Much of petitioner's testimony on direct examination consisted of responses to leading questions. Further, on cross-examination, he frequently responded to the Division's questioning by stating that he did not recall or by hedging his responses.

16. What follows is one example that shows the nature of petitioner's testimony on cross-examination:

Attorney McCann: "When is the last time you recall making a sales tax payment prior to April of 1993?"

Mr. Alteri: "Prior to that? Had to have been in '87."

Mr. McCann: "So you maintain that you paid sales tax in 1987?"

Mr. Alteri: (Nods head)

Administrative Law Judge: "You have to verbalize 'yes' or 'no'. You just can't nod."

Mr. Alteri: "Yes. As far as I know."

Attorney McCann: "Do you have any documentary proof of that?"

Mr. Alteri: "If I do, it would be at the restaurant."

Mr. McCann: "You don't have it here with you today?"

Mr. Alteri: "No." (Tr, pp. 59-60.)

17. In sum, petitioner was not a forthright witness. In addition, his testimony that he thought his plea in the criminal prosecution settled everything was not believable. Moreover, he failed to present any independent evidence to support his testimony. Dr. Trevisani's note did not support his testimony that he endured treatment for cancer during the period at issue as noted in Finding of Fact "14".

### ***SUMMARY OF THE PARTIES' POSITIONS***

18. Petitioner maintains that he did not willfully fail to pay his sales tax because he did not say, "Let me rob the government" (tr., p. 98). Rather, he offers a mental health excuse for such failure, a consequence of his depression from his cancer treatment. Petitioner also contends that his plea in the criminal prosecution does not mean that there was fraud. In addition, petitioner argues that he cooperated during the investigation which should be viewed as a mitigating factor. Finally, as noted in Finding of Fact "13", petitioner established his civic spirit, and he contends that it is unfair that others of lesser character have been able to take advantage of the State's tax amnesty program to avoid the imposition of penalties.

19. The Division maintains that it has shown by clear and convincing evidence that petitioner's failure to file returns and pay sales tax was due to fraud. Petitioner's plea of guilty to willful failure to file a return and to petit larceny "satisfies any scienter requirement for fraud that may apply in this case" (Division's brief, p. 14). In addition, according to the Division, there are additional indicia of fraud including (i) petitioner's complete lack of filing despite his collection of sales tax and the preparation of returns by his accountant, (ii) misstatements to the auditor and/or the investigator, (iii) petitioner's testimony concerning an alleged mental health excuse for his behavior which was "belied by the evidence" (Division's brief, p. 17) as well as his "inconsistent, vague and/or evasive testimony" (Division's brief, p. 19), and (iv) petitioner's admission to the investigator that he had "no excuse" for not filing and remitting sales tax (Division's brief, p. 20). The Division also notes that the disposition of the criminal proceeding

did not foreclose it from seeking civil fraud penalties and interest. Further, petitioner was a fiduciary in regard to the collection of sales tax, and his failure to report and remit such taxes for several years constituted fraud.

### ***CONCLUSIONS OF LAW***

A. Tax Law former § 1145(a)(2), as in effect during the years at issue, provides, in pertinent part:

"If the failure to pay or pay over any tax to the commissioner of taxation and finance within the time required by this article is due to fraud . . . there shall be added to the tax (i) a penalty of fifty percent of the amount of the tax due, plus (ii) interest on such unpaid tax at the rate of twelve percent per annum or the underpayment rate of interest . . . whichever is greater, for the period beginning on the last day prescribed by this article for the payment of such tax . . . and ending on the day on which such tax is paid, plus (iii) . . . an amount equal to fifty percent of the interest payable under subparagraph (ii) of this paragraph, on that portion of the unpaid tax which is attributable to fraud."

B. In Matter of Cinelli (Tax Appeals Tribunal, September 14, 1989), the Tribunal provided the following guidance in determining whether a taxpayer may be subject to the civil fraud penalty:

"The burden of showing fraud under § 1145(a)(2) has consistently been interpreted to reside with the Division [citations omitted]. The standard of proof necessary to support a finding of fraud requires 'clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing.' (Matter of Iiter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988, citing, Matter of Walter and Gertrude Shutt, State Tax Commn., July 13, 1982).

"For a taxpayer to be subject to a civil fraud penalty, willful intent is a critical element; the individual . . . must have acted deliberately, knowingly, and with the specific intent to violate the Tax Law (Matter of Cousins Service Station, Inc., Tax Appeals Tribunal, August 11, 1988). Fraud need not be established by direct evidence, but can be shown by surveying the taxpayer's entire course of business and drawing reasonable inferences therefrom [citation omitted]."

C. The Division has shouldered its burden to show that the fraud penalty was properly asserted against petitioner. The Division's evidence considered as a whole provides clear and convincing proof that petitioner willfully, deliberately, and intentionally sought to evade paying sales tax that was legally due.

D. First, it is noted that petitioner's criminal conviction for petit larceny based upon his



failure to pay over sales tax to the State, which he had collected from his restaurant customers, establishes the willful intent necessary to sustain the civil fraud penalty. Pursuant to Penal Law § 155.25, a person is guilty of petit larceny when he steals property. The crime of petit larceny requires the intent to deprive an owner of his property (see, People v. Schmid, 124 AD2d 896, 508 NYS2d 314, appeal denied 69 NY2d 955, 516 NYS2d 1039). In petitioner's case, in his capacity as a fiduciary who had collected sales tax from his restaurant's customers on the State's behalf without remitting it to the State, petitioner deprived the State of its tax revenue. By pleading guilty to petit larceny as a result of his failure to remit sales tax, it may be concluded that petitioner had the intent to deprive the State of its property. Further, petitioner's guilty plea to one count of willful failure to file a sales tax return serves not only to estop petitioner from contesting the imposition of a civil fraud penalty for the period covered by the one count but also may properly be viewed as showing fraudulent intent for the entire period at issue (see, Matter of Cinelli, supra). Petitioner's failure to remit sales tax was not limited to just one of the sales tax quarters at issue but rather was petitioner's course of conduct for the entire period of nearly five years at issue.

E. Furthermore, despite the preparation of sales tax returns by his accountant, petitioner failed to file such returns and remit tax. In addition, the comment in the investigator's deposition that petitioner early in the investigation admitted that he had no excuse for not filing and remitting sales tax may be given weight in this determination. The inconsistent, vague, and evasive nature of petitioner's testimony, together with the lack of any independent evidence to support it, failed to undermine the Division's case (see, Meixsell v. Tax Appeals Tribunal, \_\_\_ AD2d \_\_\_, 659 NYS2d 325). In particular, petitioner's testimony at the hearing concerning a mental health excuse for his failure to file and remit sales tax was contradicted by Dr. Trevisani's note and deserves no credence.

F. In sum, petitioner's criminal conviction and the additional indicia of fraud as listed above support the imposition of a civil fraud penalty against petitioner (cf, Matter of Uncle Jim's Donut and Dairy Store, Inc., Tax Appeals Tribunal, October 5, 1989).

G. The fact that other taxpayers of lesser character than petitioner might have taken advantage of the Division's tax amnesty program is irrelevant to the matter at hand.

H. As noted in Finding of Fact "2", the Division has agreed to reallocate petitioner's payment of \$52,002.84 entirely to tax shown due. By doing so, there will be no additional penalty and interest accruing on unpaid tax under Tax Law § 1145(a)(2) subsequent to the date of payment of the \$52,002.84 by petitioner. However, pursuant to Tax Law § 1145(a)(7), interest properly continues to accrue on unpaid penalty and interest.

I. The petition of Fernando J. Alteri is granted to the extent of the Division's agreement to reallocate petitioner's payment of \$52,002.84 as noted in Finding of Fact "2", but, in all other respects, is denied, and the Notice of Determination dated June 5, 1995 is sustained.

DATED: Troy, New York  
October 9, 1997

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE